

**(1993) 09 GUJ CK 0008**  
**In the Gujarat High Court**  
**Case No : Stamp Reference No. 1 of 1982**

Shailesh Textile Industries

APPELLANT

Vs

The Chief Controlling Revenue Authority, Ahmedabad and  
Another

RESPONDENT

**Date of Decision :** 15-09-1993

**Acts Referred:**

Bombay Stamp Act, 1958 — Article 25, 27, 7, 2(p), 31  
Comptroller and Auditor-Generals (Duties, Powers and Conditions of Service) Act,  
1971 — Section 16  
Evidence Act, 1872 — Section 92  
Income Tax Act, 1961 — Section 230A(1)  
Registration Act, 1908 — Section 17, 17(1), 32A  
Transfer of Property Act, 1882 — Section 58, 59, 70

**Citation :** AIR 1994 Guj 153

**Hon'ble Judges :** J.M. Panchal, J;D.G. Karia, J;A.P. Ravani, J

**Bench :** Full Bench

**Advocate :** V.P. Shah, for the Appellant; K.C. Shah, instructed by H.M. Bhagat,  
for the Respondent

## Judgement

Panchal, J.—This is a reference made u/s 54(1A) of the Bombay Stamp Act, 1958 (Bombay Act No. 60 of 1958) by the Chief Controlling Revenue Authority, Gujarat State, Ahmedabad, who dismissed the revision application against the order passed by the Collector of Stamps, Surat imposing a duty of Rs. 27,191.50 Ps. (Rupees twenty seven thousand one hundred ninety one and fifty paise) together with a penalty of Rs. 5/- (five) on an agreement purportedly relating to deposit of title deeds, which came to the notice of the Collector of Stamps, Surat.

### 2. FACTS :-

The applicant -- M/s. Shailesh Textile Industries is a registered partnership firm and carries on business in textile through its 7 partners. The applicant-firm wanted to avail of loan and credit facilities and, therefore, approached Dena Bank, which is a corporate Body and a nationalised bank under the provisions of

Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (hereinafter referred to as "Dena Bank" for short). On 24th August, 1974, Dena Bank sanctioned a term loan of Rs. 1,10,000/- (Rupees one lac ten thousand only) and also an advance of Rs. 10,00,000/- (Rupees ten lacs) under I.D.B.I. Rediscounting Scheme and desired to secure repayment of same by registered equitable mortgage of lands and buildings of the applicant. It appears that the title deeds mentioned in the First Schedule and relating to the properties described in Second Schedule of the agreement relating to deposit of title deed dated December 9, 1974, were delivered and deposited by the applicant on October 3, 1974 with the Dena Bank at its Regional Office situated at Nanpura, Surat. Dena Bank in order to secure repayment of (i) term loan of Rs. 1,10,000/-, (ii) specific deferred payment guarantee limit under I.D.B.I. Rediscounting Scheme to the tune of Rs. 10,00,000/-, (iii) dues in respect of the said credit facilities with interest thereon, (iv) any other credit facilities, which may be granted by the Bank to the applicant from time to time with interest and (v) such sums of money as may become due from time to time under the said credit facilities with other usual and lawful charges together with costs and expenses, obtained from the applicant-firm a registered deed dated December 9, 1974.

3. In this Reference, the controversy centres around the above referred deed dated December 9, 1974 and, therefore, in order to determine the true nature and purport of the said deed, we propose to examine the material part of the aforesaid instrument by specific reference to following three clauses :-

(1) The title deeds mentioned in the first Schedule hereto relating to the properties fully described in the Second Schedule hereto have been delivered and deposited by us on October 3, 1974 with Dena Bank at its Regional Office situated at Nanpura, Surat, for securing on terms loan limit of Rupees 1,10,000/- only and to secure specific deferred payment guarantee limit under Industrial Development Bank of India Rediscounting Scheme to the tune of Rs. 10,00,000/- only and payment of the dues in respect of the said credit facilities with interest thereon at seven per cent over Reserve Bank of India interest minimum rate being 16% per annum and to secure the repayment under any other credit facility which may be granted by the said Bank to us from time to time with interest thereon at the aforesaid rate and all such sums of money as may become due from time to time from us in respect of said credit facilities with other usual or lawful charges together with costs and expenses which may be incurred by the said Bank. We further state that we have read and understood the terms of sanction of the credit facilities granted to us by Dena Bank and we agree to abide by the same.

(2) We further state that the said documents of title referred to in Schedule "A" in respect of the property shown in Schedule "B" are deposited with Dena Bank with intent to create First Equitable Mortgage thereon i.e. on the lease-hold rights over the land and the existing ownership structure which is in progress of

construction and the entire construction which may be put up on the said land from time to time. The said property shall remain with the Bank in first equitable mortgage till the entire dues of the Bank in respect of all credit facilities are fully satisfied and the accounts in respect of the credit facilities are fully and finally cleared.

(3) Our accounts are opened in Sahara Gate Branch, Surat of Dena Bank. The said property shall continue in first equitable mortgage by the Bank on which the Bank may from time to time grant subject to the maximum limit of Rs. 10,00,000/- (ten lacs) only as stated above and as per the agreed terms. The original lease deed is our document of title and Gujarat Industrial Development Corporation has handed over the said document to us as duplicate is not registered as our document of title in variation of the statement made in original lease with specific understanding that the same is to be deposited by us with Dena Bank to create first equitable mortgage for the various facilities granted to us.

4. The above-referred deed was written on a stamp of Rs. 5,500/- and registered with the Office of Sub-Registrar, Surat on December 9, 1974 itself. The Accountant General of Gujarat as per the powers vested in him u/s 16 of the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971, conducted audit of the Office of Sub-Registrar, Surat for the period commencing from January, 1974 to December, 1974. The Accountant General, Gujarat drew-up the report dated February 12, 1976, which contain 7 paragraphs involving objections with regard to 91 documents. The Inspector General of Registration at Ahmedabad, who is head of the Registration Department, is required by law to look into the facts of each document for which objections may have been raised by the Auditor and to direct the concerned Sub-Registrar to take further action on the instrument if he accepts objections. The Inspector General of Registration, Ahmedabad accepted the objections mentioned in the Audit Report dated February 12, 1976 drawn up by the Accountant General, Gujarat and instructed the Sub-Registrar, Surat vide letter dated February 18, 1978 to take immediate follow-up action in the case. Under the provisions of the Bombay Stamp Act, 1958, the Collector of Stamps is competent authority to initiate action in regard to the documents which are not duly stamped. The Sub-Registrar, therefore, informed the applicant-firm to present the said document before the Collector of Stamps, Surat and requested the Collector of Stamps, Surat to take appropriate action vide letter dated June 14, 1978. On receipt of the letter from sub-Registrar, Collector of Stamps called upon Dena Bank to produce the instrument in question before him vide letter dated July 21, 1978. Pursuant to the above-referred requisition, Dena Bank produced the instrument dated December 9, 1974 before the Collector of Stamps, Surat along with its forwarding letter dated August 4, 1978. The Collector of Stamps, exercising powers under the Act, is a quasi-judicial authority and supposed to follow principles of natural justice and, therefore, in order to comply with the requirement of principles of natural justice, the Collector of Stamps, Surat vide

letter dated April 11, 1979 called upon the applicant-firm to present its case before him. The applicant-firm presented its case in writing by submitting two letters dated April 25, 1979 and May 17, 1979. The Collector of Stamps, Surat heard the partner of the applicant-firm on July 16, 1979 and determined the true nature of the said document. The Collector of Stamps came to the conclusion that though the document was titled as an agreement relating to deposit of title deed, in reality it was a mortgage deed chargeable with stamp duty under Article 40 read with Article 25(b) of Schedule-I to the Bombay Stamp Act, 1958. The Collector of Stamps, therefore, passed an order dated February 11, 1980 for recovery of deficit stamp duty of Rs. 27,151.50 ps. (Rupees twenty seven thousand one hundred fifty one and paise fifty) together with a penalty of Rs. 5/- (five).

5. The applicant felt aggrieved by the above referred order dated February 11, 1980 passed by the Collector of Stamps, Surat and preferred an revision application on February 23, 1980 before the Chief Controlling Revenue, Authority, Gujarat State, Ahmedabad under the provisions of Sub-section (1) of Section 53 of the Bombay Stamp Act, 1958 (hereinafter referred to as the "Act"). The Chief Controlling Revenue Authority, Gujarat State, Ahmedabad (C. C. R. A. for short) after hearing the applicant confirmed the order passed by the Collector of Stamps by order dated September, 3, 1981. Section 54(1A) of the Act enables any person aggrieved by the decision of the Chief Controlling Revenue Authority to submit an application requiring the Chief Controlling Revenue Authority to draw-up a statement of the case and refer it to the High Court for its opinion. The applicant, therefore, submitted an application and required the C. C. R. A. to draw-up a statement of the case and refer it to the High Court for its opinion. The C. C. R. A. accordingly drew-up statement of the case and has made the present reference to this Court.

6. The question of law referred to the High Court for opinion and our answers thereto are as follows:

Sr. No.

Questions    Answers

1.

Whether the Opponent No. 2 has exercised the powers conferred on him u/s 68 r.w. sec. 33 of the Act within the reasonable period of time.

In the affirmative i.e. against the applicant and in favour of revenue.

2.

Which is the proper Article under which the impugned document dated 9th December, 1974 is chargeable with stamp duty under the Bombay Stamp Act, 1958. Article 6 as claimed by the applicants or Article 40 (new Art. 45) read with Art. 25(b) (new Art. 27(b)) as claimed by the Chief Controlling Revenue

Authority or any other Article 7 .

The document in question is chargeable with stamp duty under Art. 40 (new Art. 45) read with Art. 25(b) (new Art. 27(b)) as claimed by the revenue.

REASONS :--

7. The answer to the question whether the Collector of Stamps has exercised powers u/s 68 read with Section 33 of the Act within reasonable period or not, depends upon consideration of number of factors. It is to be noted that the Act does not prescribe any period of limitation within which the Collector of Stamps should exercise powers u/s 68 read with Section 33 of the Act. However, it is well settled that when no period of limitation is prescribed, power has to be exercised by the authority on whom it is conferred within a reasonable time and the length of reasonable time depends upon the nature of the order and the facts of each case.

All the statutory authorities are required to exercise powers reasonably. Reasonable exercise of powers pre-supposes that the authority on which the power is conferred shall act in just, fair and reasonable manner. Once an authority is required to act in just, fair and reasonable manner and not arbitrarily, the principles of natural justice come into play. Powers conferred on any statutory authority have to be exercised genuinely and for the purpose for which they have been conferred. To determine as to whether the power conferred is exercised genuinely or not, one has to take into consideration the time element as one of the relevant factors. If the power is exercised after inordinate delay, in a given case it may be said that it is not genuine exercise of power. There is no manner of doubt that the Collector of Stamps has to exercise powers conferred on him u/s 33 read with Section 68 of the Act within reasonable time. However, the length of the reasonable time will have to be determined with reference to the facts and circumstances of each case and also with reference to the nature of the order.

8. Before answering Question No. 1 posed in this reference, it would be worthwhile to note in brief the Scheme of the Act and certain provisions of the Act having direct bearing on the matter on hand.

9. As indicated in the preamble of the Act, the Bombay Stamps Act, 1958 was enacted to consolidate and amend the law relating to stamps and rates of stamp duties in respect of the documents other than those specified in Entry 91 of List-I in the Seventh Schedule to the Constitution of India. Chapter-I is preliminary and contains definitions of different words and phrases. Chapter-II deals with matters such as: (a) liability of instrument to duty, (b) stamps and the mode of using them, (c) of the time of stamping instruments, (d) of valuations of instruments for duty, (e) duty by whom is payable etc.

Chapter-III of the Act deals with adjudication as to stamps, whereas Chapter-IV of the Act provides for action to be taken in case of instruments not duly

stamped. Chapter-V deals with allowances for stamps in certain cases; whereas Chapter-VI deals with reference and revision. Chapter-VII deals with offences and procedure for trying offences and also provides for penalty and Chapter-VIII contains supplemental provisions.

10. Section 31 which falls under Chapter-III of the Act enables a person to bring before the Collector any instrument whether executed or not and whether previously stamped or not and to apply to the Collector to have the Collector's opinion as to the duty with which it is chargeable. Subject to the fulfilment of certain requirements as laid down by Section 31 of the Act, the Collector is enjoined upon to determine the duty with which in his judgment, the instrument is chargeable. Section 32A enables any officer registering under the Registration Act, 1908, an instrument of conveyance, exchange, gift, partition, partnership or settlement or power of attorney as well as any person referred to in Section 33 of the Act, to refer the instrument to the Collector of such district for determining the true market value of such property and proper duty payable on the instrument if the officer or as the case may be, persons referred to in Section 32 of the Act, has reason to believe that the consideration set forth in the instrument does not approximate to the market value of the property or the market value of the property which is subject matter of such instrument, has not been truly set forth therein. Section 33 of the Act provides that subject to the provisions of Section 32A every person having by law or consent of parties, authority to receive evidence, and every person in charge of a public office except an officer of police department, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions shall, if it appears to him that such an instrument is not duly stamped, impound the same. Section 37 of the Act enjoins duty upon the person impounding an instrument u/s 33 to send to the Collector an authenticated copy of such instrument together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof and such person is also required to send such amount to the Collector or such person as may have been appointed in this behalf. In cases which are not covered by Sub-section (1) of Section 37 of the Act, the person impounding an instrument is required to send instrument in original to the Collector. Section 68 of the Act lays down that the Collector may, where he has reason to believe that all or any of the instruments specified in Schedule-I have not been charged with duty leviable under this Act, authorise in writing any officer to enter upon any premises where he has reason to believe that any registers, books, records, papers, documents or proceedings relating to or in connection with any such instruments, are kept and to inspect them and to take such notes and extracts as such officers deems necessary, and if necessary, to seize them and to impound them u/s 33 of the Act. Sub-section (2) of Section 68 provides that every person having in his custody or maintaining such registers, books, records, papers, documents or proceedings shall, when so required by the officer authorised under Subsection (1), produce them before such officer and at all reasonable times permit such officer to inspect them and

take the notes and extracts as he may deem necessary.

11. Having referred to certain provisions of the Act, which have direct bearing on the issue involved in this reference, we now proceed to examine Question No. 1 posed in this Reference. The contention that the Collector, Surat should have exercised powers conferred on him u/s 33 read with Section 68 of the Act within reasonable period from December 9, 1974 i.e. the day on which the document was executed and registered with the office of Sub-Registrar, Surat and in any view of the matter, within reasonable time from the date of audit report drawn-up by the Accountant General, Gujarat on February 12, 1976, has no substance. The very nature of the power conferred upon the Collector u/s 33 read with Section 68 of the Act is such that no time limit can be prescribed for the exercise of powers u/s 33 of the Act of which the starting point of time would be the date of execution of document or the date of audit report. A bare reading of Section 33 makes it clear that apart from Collector of Stamps, every person having by law or consent of parties, authority to receive evidence, has power to impound an instrument, if it appears to the said authority that such instrument is not duly stamped. So also, every person in charge of a public office except an officer of police department, has also authority to impound an instrument, if on production of the instrument or coming to know about instrument in the performance of his functions, he has reason to believe that the instrument is not duly stamped. The powers conferred by Section 33 may be exercised by Court of law in which an instrument is sought to be tendered in evidence or even before an arbitrator. A document executed, say before 10 years might not have been used in evidence or produced before any authority or officer for all the time and might be produced before an authority having by law or consent of parties, authority to receive evidence after several years. At that time, the authority receiving the same in evidence, may find that the instrument is not duly stamped. The question to be asked and examined is, whether power to impound the instrument has to be exercised within reasonable period from the date of execution of the instrument? In our view, the answer is "No". A reference may be made to Section 34 of the Act, which inter alia provides that the instruments which are not duly stamped, are inadmissible in evidence. Proviso to Section 34 empowers the authority to admit such instruments which are not duly stamped in evidence on payment of penalty as provided therein. However, Section 57 of the Act provides that if any Court, other than the High Court, feels doubt as to the amount of duty to be paid in respect of any instrument under Clause (a) of Proviso to Section 34, the Judge may draw up a statement of the case and refer it, with his own opinion thereon, for the decision of the High Court. Such reference is required to be dealt with as provided u/s 54 of the Act as if the reference is made by the C.C.R.A. Section 58 of the Act empowers the appellate Court or the High Court as the case may be, to record a declaration that the instrument in question should not have been admitted in evidence by the Court specified therein without the payment of duty and penalty u/s 34 or without the payment of a higher duty and penalty than those paid and after requiring the

person in possession to produce the same to impound it when produced. Thus, the question of admissibility or otherwise of a document in evidence or impounding it by appellate Court or High Court may arise after several years of its execution. Therefore, the contention that power to impound the deed should have been exercised by the Collector of Stamps within reasonable period from the date of execution of the document cannot be accepted. Similarly, though Section 32A of the Act enables any officer registering a document under the provisions of the Registration Act, 1908 to refer the instrument to the Collector for determining true market value of property covered by the document, if he has reason to believe that the market value of the property has not been truly set forth, failure to make reference to the Collector of Stamps by registering authority would not have any vitiating effect on the power of the Collector to impound an instrument insufficiently stamped when that fact comes to his knowledge. In view of this, the submission that the Collector of Stamps should have exercised power to impound the deed in question within reasonable time from the date on which the document was presented before Sub-Registrar for registration, has also no substance.

12. From the Scheme of the Act it cannot be said that the powers conferred u/s 33 read with Section 68 of the Act should be exercised within a particular time limit only from a specified date because one is not sure as to when an instrument insufficiently stamped, will be produced before any person having authority to receive the same in evidence. The scheme of the Act indicates that the powers may be exercised by the Collector u/s 33 read with Section 68 of the Act as and when occasion arises as provided under different provisions of the Act. Such occasion may arise any time after the execution of the document and it may be even after several years. Whether powers conferred u/s 33 read with Section 68 of the Act have been exercised within reasonable time or not, would depend upon facts of each case. If the Collector or for that reason any of the persons mentioned in Section 33 of the Act does not initiate any action within reasonable time or sits light over the matter after coming to know that the document is insufficiently stamped, then in a given case, it may be argued that the power to impound an instrument, has not been exercised within a reasonable time. However, one thing is very clear that while considering the question whether the Collector of Stamps has exercised powers within a reasonable period or not, date of execution of the document is not material at all and what is material is the date on which the document was produced before the Collector or the date on which the Collector came to know that the instrument was not duly stamped. There is no provision either under the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971 or Bombay Stamp Act, 1958 enjoining upon the Auditor General to send a copy of audit report to the Collector of Stamps. Under the circumstances, the date of the report of Auditor General would also not be relevant for deciding the question as to whether the Collector of Stamps has exercised powers conferred on him by Section 33 read with Section 68 of the Act within reasonable period.

13. In the facts of the present case, it is an admitted position that the applicant-firm had not brought the instrument in question before the Collector to have his opinion as to the duty with which it was chargeable as required by Section 31 of the Act. The Officer registering the document in question on December 9, 1974 had not made any reference to the Collector as postulated by Section 32A of the Act. There is nothing on the record of the case to suggest that the Accountant General had sent a copy of the audit report dated February 12, 1976 to the Collector of Stamps, Surat. The audit report contained 7 paragraphs involving objections in respect of 91 documents. The Inspector General of Registration, Ahmedabad accepted the objections raised in Para 5 of the Audit Report and instructed the Sub-Registrar, Surat to take immediately the follow-up action by letter dated February 18, 1978. Thereupon, the Sub-Registrar, Surat requested the Collector to initiate appropriate action by his letter dated 14th June, 1978. The Collector, Surat thereafter called upon the Dena Bank to produce the instrument by letter dated July 21, 1978 and initiated appropriate proceedings after Dena Bank produced instrument before him along with its letter dated August 14, 1978. From the record of the case, it is evident that the Collector, Surat gave an opportunity of being heard to the applicant, which was availed of by the applicant by submitting two letters dated April 25, 1979 and May 17, 1979. The Collector of Stamps also heard the partner of the applicant-firm on July 16, 1979 and ultimately passed the order on February 11, 1980. Thus, for the first time, the document was produced before the Collector of Stamps on August 4, 1978. Therefore, in the facts of the case, we are of the opinion that the Collector, Surat exercised powers conferred on him u/s 33 read with Section 68 of the Act within reasonable time and there was no undue and unreasonable delay on his part in exercising those powers. Having regard to the overall facts and circumstances of the case, it cannot be said that the Collector, Surat had not exercised powers within reasonable time. Therefore, our answer to Question No. 1 is in affirmative i.e. against the applicant and in favour of revenue.

14. For the purpose of considering the second question as to which is the proper Article under which the document dated December 9, 1974 is chargeable with stamp duty under the Bombay Stamp Act, 1958, it would be necessary to make reference to certain provisions of the Transfer of Property Act, 1882 and the Bombay Stamp Act, 1958.

15. The term "mortgage" is defined in Section 58 of the Transfer of Property Act, 1882. The relevant portion of Section 58 of the said Act as reproduced below, reads:--

"Section 58(a): A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transfer is called a mortgager, the transferee, a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage money, and

the instrument (if any) by which the transfer is affected is called a mortgage-deed."

Section 58(f): Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in that behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds."

16. It is quite clear that Section 58 of the Transfer of Property Act specifies six different kinds of mortgages of which Clause (f) as reproduced above, provides for "mortgage by deposit of title deeds". This type of mortgage is also known as "Equitable Mortgage" in the English Law. Unlike the other kinds of mortgages, the transaction of mortgage by deposit of title deeds can be effected orally also in view of the provisions of Section 59 of the Transfer of Property Act. The term "mortgage deed" is also defined in Clause (p) of Section 2 of the Bombay Stamp Act, 1958, as follows:--

"(p): "mortgage deed" includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers or creates to, or in favour of another, a right over or in respect of specified property."

17. From the different provisions of the Act, it appears that prior to Amendment Act (No. 23 of 1977) which was brought into force with effect from Sept. 1, 1977, a memorandum recording the complete oral transaction of mortgage by deposit of title deeds, was not chargeable to any stamp duty. After the amendment, the rates of proper stamp duty leviable on the instrument of mortgage deed are prescribed in Entry 40 (new Entry 45) of Schedule-1 to the Act, whereas the rates of proper stamp duty leviable on the instrument of agreement relating to deposit of title deeds, pawn or pledge, are prescribed in Entry No. 6 of Schedule-I of the Act. For appreciating controversy as to which is the proper Article applicable to the document in question, relevant Articles are reproduced herein-below:--

Article 40 MORTGAGE DEED, not being an Agreement relating to Deposit of Title Deeds, Pawn or Pledge (No. 6), Bottomry Bond (No. 16), Mortgage of a Crop (No. 46), Respondentia Bond, Bond (No. 59) or Security Bond (No. 60).

(a) When possession of the property or any part of the property comprised in such deed (is or is not given, or is agreed to be given, by the mortgagor). The same duty as is leviable on a conveyance under clause (a) or (b), as the case may be, of Article 27 for a consideration equal to the amount secured by such deed.

(b) When a collateral or ancillary of additional or substituted security, or by way

of further assurance for the above mentioned purpose where the principal or primary security is duly stamped for every sum secured not exceeding Rs.1,000/- Five rupees

and for every Rs. 1000/- or part thereof secured in excess of Rs. 1.000/- Five rupees

Article 6. Agreement relating to deposit of title deeds, pawn or pledge, that is to say any instrument evidencing an agreement relating to;

(1) the deposit of title deeds or instruments constituting or being evidence of the title to any property whatever (other than a marketable security), or

(2) the pawn or pledge of movable property where such deposit, pawn or pledge has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt;

(a) if such loan or debt is repayable on demand or more than three months from the date of the instrument evidencing the agreement :

If the amount of loan does not exceed Rs. 500/- Rs.5/-

If it exceeds Rs. 500/- and does not exceed Rs. 1,000 Rs. 10/-

and for every Rs. 1,000/- or part thereof in excess of Rs. 1,000/- Rs. 10/-

(b) If such loan or debt is repayable not more than three months from the date of such instrument Half the duty payable under sub-clause (a).

18. The description of an instrument given in Entry No. 6 covers only an agreement relating to deposit of title deeds and not an instrument of mortgage by deposit of title deeds. Any instrument whereby one person transfers or creates to, or in favour of another, a right over or in respect of specified property for the purpose of securing money advanced or to be advanced by way of loan or an existing or future debt would be covered within the scope of term "mortgage deed" as defined in Clause (p) of Section 2 of the Act and shall attract the rates of stamp duty prescribed for mortgage deed in Entry 40 (new Entry 45) of Schedule-I to the Act. Such an instrument shall also require compulsory registration under the provisions of the Indian Registration Act, 1908. An agreement or Memorandum of Agreement relating to deposit of title deed is not a mortgage deed, as it does not transfer or create to or in favour of, another a right over, or in respect of specified property. Therefore, such an instrument will not require compulsory registration and under the scheme of the Bombay Stamp Act, lower rates of stamp duty than those prescribed for "mortgage deed" would be attracted to such an instrument.

19. In view of different rates having been prescribed for an instrument of mortgage deed and an agreement relating to deposit of title deeds, it becomes necessary to ascertain the true nature and character of deed dated December 9, 1974. It is cardinal principle of construction of a document that the true import

of the document or of a particular part of it has to be gathered from its terms. The most important factor in interpreting a document is to ascertain the intention for which it is executed. The intention must appear primarily from the terms of the document itself and it is only if there is an unresolved problem left by the language of the document that one need consider the manner in which the words used could be related to the facts and circumstances of the case or the nature or course of dealings. The rule of construction embodied in proviso 6 to Section 92 of the Evidence Act which enables the Court to examine the facts and surrounding circumstances to which the language of the document may be related is applicable when the words of the document taken by themselves are not so clear in their meanings. The Court cannot understand the true intent of an indenture, but only by the words of indenture. It is also well settled that the Court in order to construe a deed has to look to the substance or essence of it rather than to its form. A party cannot escape the consequences of law merely by describing an agreement in a particular form though in essence and in substance it may be different transaction.

20. The scope of mortgage by deposit of title deeds is well settled. Where a person delivers to a creditor or his agent document of title to immovable property with intent to create security thereon such transaction is called a mortgage by deposit of title deeds. Whereas in England such a mortgage known as equitable mortgage does not operate as conveyance at all though it is enforceable in equity, in India it is one of the modes of creating a legal mortgage under which an interest in the mortgaged property is transferred to the mortgagee. Three requisites of such a mortgage are (i) a debt (ii) a deposit of title deeds and (iii) an intention that the deeds shall be security for the debt. A mortgage by deposit of title deeds does not require any writing. Since it is an oral transaction, it is not affected by the law of registration. However, where, the parties professing to create a mortgage by deposit of title deeds contemporaneously enter into a contractual agreement in writing, which is made an integral part of the transaction and that itself is an operative instrument and not merely evidential, such a document would under the Act amount to mortgage by deposit of title deeds. The crucial question is: Did the parties intend to reduce the bargain regarding the deposit of title deeds to the form a document? If so, the document requires registration. If on the other hand its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then there being no express bargain, contract to create the mortgage arise by implication of the law from the deposit itself with the requisite intention and the document itself being merely evidential does not require registration (See *Rachpal Mahraj Vs. Bhagwandas Daruka and Others*, and *Veeramachineni Gangadhara Rao Vs. The Andhra Bank Ltd. and Others*, .

21. Therefore, the question to be asked and examined is did the parties choose to reduce the contract into writing? If yes, then the further question to be considered would be whether the parties intended to effect the transaction of mortgage by deposit of title deeds which required registration under the

provisions of the Registration Act, 1908 ? In other words, the question to be examined and answered is whether deed dated December 9, 1974 is an instrument of mortgage by deposit of title deeds or merely a memorandum recording the complete oral transaction of mortgage by deposit of title deeds?

22. From the material part of the instrument reproduced in the earlier paragraphs of this judgment, it becomes clear that the applicant agreed to abide by the terms of sanction of the credit facilities as prescribed by the Dena Bank in the instrument dated December 9, 1974. The applicant also created in favour of Dena Bank first equitable mortgage on the lease-hold rights over the land and the existing ownership structure which was in progress of construction and the entire construction which might be put-up from time to time on the said lease-hold land, more particularly described in Schedule-B appended to the document.

23. It is well settled that in a transaction of mortgage by deposit of title deeds, the scope of the security is the scope of title. Therefore, the scope of the security was only title to lease-hold lands described, in the registered lease deed No. 3364 dated October 4, 1973 and nothing more when the title deeds were deposited by the applicant on October 3, 1974. The contention that the deed dated December 9, 1974 is merely a memorandum evidencing and recording complete oral transaction of mortgage by deposit of title deeds with intent to create security thereon for the loan of Rs. 11,10,000/- (Rupees eleven lacs and ten thousand only) advanced by Dena Bank and, therefore, the instrument in question is chargeable with stamp duty under Article 6 of Schedule-I to the Act, has no substance. It is pertinent to note that delivery and deposit of title deeds took place according to the applicant on October 3, 1974. The lease deed was got registered on October 4, 1973 and an agreement relating to deposit of title deeds was executed between the parties on December 9, 1974. From the language employed in the instrument it is evident that the intention of the parties is not simply to record the factum of deposit and delivery of title deeds which took place on 3rd October, 1974 but the intention is to create mortgage by itself. The clause in the Deed dated December 9, 1974 to the effect that "We further state that the said documents of title are deposited with Dena Bank with an intent to create first equitable mortgage thereon i.e. on the leasehold rights over the land and the existing ownership structure which is in progress of construction and the entire construction which may be put up on the land from time to time" makes the intention of the parties clear that not only the parties had chosen to reduce the contract into writing, but deposit of the title deeds and the execution of the document formed integral parts of one and the same transaction and it was intended to create the mortgage by the deed itself. As is clear from the facts of the case stated by C.C.R.A. while making reference, payment of the amount of term loan and advance of Rs. 10,00,000/- (ten lacs) under the I.D.B.I. Rediscounting Scheme was to be secured by registered equitable mortgage of lands and buildings of the applicant. At the time of delivery and deposit of title deeds On October 3, 1974, no unregistered equitable mortgagae of lands and buildings was effected in favour of Dena Bank and

registered equitable mortgage of lands and buildings of the, applicant was created by the applicant for the first time by deed dated December 9, 1974.

24. As observed earlier, in an equitable mortgage by deposit of title deeds, the scope of security is the scope of title. At the time of delivery and deposit of the title deeds on October 3, 1974, scope of title at the best, was a lease-hold piece of land known as Plot No. 77 in Pandesara Industrial Estate and the scope of title never included any super structure thereon. The instrument dated December 9, 1974 is a written bargain covering the scope of title deed, not only of the lease-hold land, but also of existing super structure and the super-structure which may come-up on the land even in future. By the document in question, a right or interest in the property of the applicant in favour of Dena Bank is created and so, the document would fall within the definition of term "mortgage deed" as defined in Section 2(p) of the Bombay Stamp Act, 1958. In view of contents and terms of the document, it is clear that the deed dated December 9, 1974 is a deed of mortgage by deposit of title deeds and not a memorandum evidencing complete oral transaction of mortgage by deposit of title deeds.

25. Even if it were to be held that terms of the deed are not clear and therefore, reference to the surrounding circumstances is necessary to ascertain intention of the parties, there are two such circumstances to which reference should be made. One such relevant surrounding circumstance is to be found in letter dated February 22, 1980 addressed by the Branch Manager of Dena Bank, Shara Gate, Surat to the applicant. The reference made by C.C.R.A. contains statement of case and from the statement of the case, it is evident that by the above referred letter dated February 22, 1980, the applicant was informed by the Dena Bank that transaction of the term loan of Rs. 1,10,000/- and advance of an amount of Rs. 10,00,000/- under I.D.B.I.

Rediscounting Scheme on 24th August, 1974 was subject to the terms and conditions enumerated in the said letter. According to the terms and conditions of the repayment mentioned in the letter dated February 22, 1980, repayment of the term loan limit of Rs. 1,10,000/- was to be secured by registered equitable mortgage of lands and buildings, whereas the advance of an amount of Rs. 10,00,000/- under I.D.B.I. Rediscounting Scheme was to be secured by:--

- (i) hypothecation of machinery to be purchased under I.D.B.I. Rediscounting Scheme.
- (ii) counter guranteee of the firm and all the partners in their personal capacity, and
- (iii) extension of first charge of registered equitable mortgage.

The use of and reference to the term "registered equitable mortgage" by the Dena Bank in its letter dated February 22, 1980 while enumerating terms and conditions on which repayment of two limits sanctioned in favour of the applicant was to be secured, make the intention of the parties to the instrument,

emphatically clear. The intention was to reduce their bargain regarding deposit of title deeds in writing and, therefore, the deed dated 9th December, 1974 was executed, creating mortgage in favour of Dena Bank.

26. Second relevant surrounding circumstance is to be found in the Deed dated 9th December, 1974 itself. After the endorsement made by the Joint Sub-Registrar, Surat-V regarding executants having been properly identified by their Advocates, an endorsement is made about receipt of Income Tax Certificate u/s 230A(I) of the Income Tax Act, 1961. Section 230A(1) of the Income Tax Act reads as under:--

"230A. Restrictions on registration of transfers of immovable property in certain cases.

(1) Notwithstanding anything contained in any other law for the time being in force, where any document required to be registered under the provisions of Clause (a) to Clause (e) of Sub-section (1) of Section 17 of the Indian Registration Act, 1908 (16 of 1908), purports to transfer, assign, limit, or extinguish the right, title or interest of any person to or in any property valued at more than two lakhs rupees, no registering officer appointed under that Act shall register any such document, Unless the Assessing Officer certifies that:--

(a) such person has either paid or made satisfactory provision for payment of all existing liabilities under this Act, 1947 (21 of 1947), the Indian Income Tax Act, 1922 (11 of 1922), the Wealth-tax Act, 1957 (27 of 1957), the Expenditure-tax Act, 1957 (29 of 1957), the Gift-tax Act, 1958 (18 of 1958), the Super Profits Tax Act, 1963 (14 of 1963) and the Companies (Profits) Surtax Act, 1964 (7 of 1964) or

(b) the registration of the document will not prejudicially affect the recovery of any existing liability under any of the aforesaid Acts."

27. In the case of *Rachpal Mahraj Vs. Bhagwandas Daruka and Others*, the Supreme Court has ruled that when the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security is necessary and which is going to create charge in conjunction with the deposit, such a document requires registration u/s 17 of the Indian Registration Act, 1908, as a non-treastamentary instrument, where the value of such property is one hundred rupees and upwards. Even according to the applicant, the document puported to transfer, assign, limit of extinuigh the right, title or interest of the applicant in the property mentioned in Schedule B to the Deed and, therefore, the applicant obtained Income Tax Certificate as required by Section 236A(1) of the Income Tax Act, 1961. If the deed dated 9th December, 1974 was merely a recital of transaction of mortgage by deposit of title deeds for securing repayment of the amount advanced to the applicant, it was not necessary at all for the, applicant to obtain certificate as postulated by Section 230A(I) of the Income Tax Act, 1961. Thus, from the surrounding circumstances also it is clear that the intention of the parties was to create mortgage by deposit

of title deeds by deed dated December 9, 1974 and as such the said instrument is chargeable with stamp duty under Article 40 (new Article 45) read with Article 25(b) (new Article 27) of Schedule 1 to the Bombay Stamp Act, 1958.

28. The contention that in view of the provisions of Section 70 of the Transfer of Property Act, 1882, reference to construction which might be put-up on the said land from time to time in deed dated 9th December, 1974, is of no consequence and the said agreement is an agreement evidencing oral transaction of mortgage by deposit of title deeds covered by Article 6 of Schedule-I to the Act, has no substance. On fair reading of the terms and conditions contained in deed dated December 9, 1974 and the surrounding circumstances, it becomes clear that the document dated 9th December, 1974 contains all the ingredients which one would normally find in a mortgage deed. It is well settled that mere fact that the document also contains bargain with regard to deposit of title deeds, will not make it an agreement for the deposit of title deeds. [See: In Re The Indian Stamp Act, 1899 Civil Reference No. 13 of 1953, AIR 1954 Bombay 462 (SB) and Chief Controlling Revenue Authority, Board of Revenue, Madras v. Javahar Mills Ltd. AIR 1967 Madras 1 (FB)].

29. As discussed and noted above, deed dated 9th December, 1974 contains several covenants which one would not find in an agreement recording oral transaction by deposit of title deeds, pawn or pledge. Creation of first equitable mortgage on the lease-hold rights over the land and the existing ownership structure which was in progress of construction and the entire construction which might be put-up from time to time on the said lease hold land described in Schedule-B appended to the document, is a clause which has nothing whatsoever to do with an agreement recording oral transaction of mortgage by deposit of title deeds. The title deed having been deposited and that fact having been recorded, creation of first equitable mortgage on the lease-hold rights over the land and the existing ownership structure which was in progress of construction and the entire construction which might be put-up from time to time on the said lease-hold land was an obligation which was undertaken by the applicant as mortgagor to pay the mortgage debt by the deed in question itself. This is by no means a simple document recording oral transaction of mortgage by deposit of title deeds. The document is most elaborate document and by this document, the mortgagee Dena Bank acquired rights which were proper to a legal mortgagee. The document, therefore, in our opinion, would fall under Article 40 and not under Article 6 of Schedule 1 to the Bombay Stamp Act, 1958.

30. In view of the above discussion, question No. 1 is answered in affirmative i.e. against the applicant and in favour of revenue. On question No. 2, our opinion is that the instrument dated December 9, 1974 is chargeable with stamp duty under Article 40 (new Article 45) read with Article 25(b) (new Article 27(b)) of Schedule I to the Bombay Stamp Act, 1958. It is answered in favour of the revenue and against the applicant.

31. A copy of this judgment shall be sent by the Registrar under the signature

and seal of this Court as required u/s 56(2) of the Bombay Stamp Act, 1958.